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## Should the WTO Expand GATT Article XX: An Analysis of *United States — Standards for Reformulated and Conventional Gasoline*

Cynthia M. Maas

In 1963 the U.S. Congress passed the Clean Air Act (CAA)<sup>1</sup> in an effort to halt increasing air pollution caused by industrialization and automobiles.<sup>2</sup> The CAA focused initially on new vehicle standards. Congress amended the CAA in 1990 to address vehicle emissions due to fuel constituents.<sup>3</sup> The U.S. Environmental Protection Agency (EPA) created its gasoline regulation to facilitate compliance with the Clean Air Act amendments.<sup>4</sup> The regulation, however, establishes different requirements for domestic and foreign gasoline.<sup>5</sup> As a result, Venezuela and Brazil claimed that the regulation violates the General Agreement on Tariffs and Trade (GATT)<sup>6</sup> and challenged the regulation under the World Trade Organization (WTO) dispute settlement procedures.<sup>7</sup> A WTO panel decided against the United States,

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1. The CAA is the popular name for the Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7671 (1988 & Supp. V 1993).

2. Pamela Cohn, *Automobile Pollution: Japan and the United States—Cooperation or Competition?*, 9 EMORY INT'L L. REV. 179, 193 (1995).

3. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 219, 104 Stat. 2492-500 (1990) (codified at 42 U.S.C. § 7545(k) (1988 & Supp. V 1993)); First Submission of the United States to the Panel in *United States—Standards for Reformulated and Conventional Gasoline*, at ¶ 12 [hereinafter Submission of the United States] (on file with the *Minnesota Journal of Global Trade*). Harmful chemicals in gasoline form ground-level ozone, commonly referred to as smog. Studies have shown that ozone damages tissue and cells. It affects people by reducing lung function and causing chest pain, coughing, nausea, and pulmonary congestion. Researchers have also made findings of crop yield loss and damage to trees as a result of ozone. OFFICE OF AIR QUALITY PLANNING & STANDARDS, U.S. ENVTL. PROTECTION AGENCY, PUB. NO. 450-R-92-001, NATIONAL AIR QUALITY AND EMISSION TRENDS REPORT, 1991 10-11 (1992); Submission of the United States ¶¶ 13, 73.

4. 42 U.S.C. § 7545(k)(8)(A) (1988 & Supp. V 1993).

5. See *infra* notes 22-31 and accompanying text.

6. General Agreement on Tariffs and Trade, *Opened for signature* Oct. 30, 1947, 61 Stat. pts. 5,6, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. III:4 [hereinafter GATT].

7. *Venezuela Plans Challenge in GATT Protesting U.S. Reformulated Gas Rule*, 11 Int'l Trade Rep. (BNA) No. 37, at 1442 (Sept. 21, 1994); *Brazil Files*

finding that the regulation discriminated in violation of GATT provisions.<sup>8</sup>

Environmentalists and proponents of free trade have often been at odds, and this tension seems to be increasing. Because the gasoline regulation concerns an environmental measure, it represents an important dispute between the two groups. The rule also raises issues of product characterization and regulation, as well as notions of political feasibility.

This Note will discuss issues raised by the dispute over the gasoline regulation and consider the WTO Panel's conclusions. The first section describes the background of the U.S. gasoline regulation and GATT jurisprudence under Article III and Article XX. The second section outlines the gasoline dispute and the decision of the WTO Panel. The third section analyzes the gasoline regulation under GATT Article III:4 and Article XX(b), and considers questions arising from the dispute.

## I. THE GATT CHALLENGE TO THE GASOLINE REGULATION

### A. THE U.S. GASOLINE REGULATION

The CAA designates that nine highly-populated areas of the United States will be "non-attainment areas."<sup>9</sup> Gasoline sold in these areas must be "reformulated" to reduce harmful emissions below the levels present in 1990 gasoline.<sup>10</sup> The CAA refers to gasoline that meets this standard as reformulated gasoline (RFG).<sup>11</sup> In the other, less-populated areas of the United States, Congress hoped to keep pollution levels from worsening and therefore required only that the gasoline be as clean as average

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*Second WTO Complaint Against U.S. Gas Regulations*, INSIDE U.S. TRADE, June 2, 1995, at 8.

8. WTO Dispute Settlement Panel, *United States Standards for Reformulated and Conventional Gasoline*, WTO Doc., WT/DS2/R (Jan. 29, 1996) [hereinafter *Gasoline Decision*]. The United States filed an appeal on Feb. 21, 1996. Although the decision was based on Articles III and XX, the United States has appealed only under Article XX. *Administration Appeals WTO Decision on U.S. Gasoline Regulations*, INSIDE U.S. TRADE, Feb. 23, 1996, at 13.

9. 42 U.S.C. § 7545(k)(10)(D) (1988 & Supp. V 1993). The non-attainment areas represent approximately one-third of the gasoline consumed in the United States. *Oversight of the Reformulated Gasoline Rule, Hearing Before the Senate Committee on Environment and Public Works*, 103d Cong., 2d Sess. 44 (1994) (testimony of Mary Nichols, Assistant Administrator for Air and Radiation, EPA) [hereinafter *Nichols*].

10. Submission of the United States, *supra* note 3, ¶ 1.

11. 42 U.S.C. § 7545(k)(10)(E) (1988 & Supp. V 1993).

1990 gasoline. The CAA refers to gasoline with these “non-degradation” requirements as “conventional” gasoline.<sup>12</sup>

The Environmental Protection Agency (EPA) is responsible for administering a program to enforce the CAA.<sup>13</sup> The EPA issued its Final Rule (the gasoline regulation) on December 15, 1993.<sup>14</sup> The gasoline regulation establishes baseline requirements for foreign and domestic refiners and importers.<sup>15</sup>

The program for RFG began with a “simple model” that entered into effect in 1995 and will be replaced by the “complex model” in 1998.<sup>16</sup> Under the simple model, refiners must produce gasoline that meets specific requirements for several constituents of RFG, including Reid Vapor Pressure, oxygen content, benzene content, and aromatic content.<sup>17</sup> The CAA does not provide specifications, however, for sulfur, olefins, and T90.<sup>18</sup> These constituents are governed by a “non-degradation” standard, which requires that the amounts of these components do not exceed 1990 levels.<sup>19</sup> The complex model, however, does not apply the “non-degradation standard” to any properties. When the complex model takes effect in 1998, all RFG ingredi-

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12. 42 U.S.C. § 7545(k)(10)(F) (1988 & Supp. V 1993).

13. 42 U.S.C. § 7545(k)(8)(A) (1988 & Supp. V 1993). The CAA states, “[w]ithin 1 year after November 15, 1990, the Administrator [of the Environmental Protection Agency] shall promulgate regulations applicable to each refiner, blender, or importer of gasoline . . . .” *Id.*

14. *Reformulated Gasoline, Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 103d Cong., 2d Sess. H3 (1994) (testimony of Sally Katzen, Administrator, Office of Management and Budget) [hereinafter Katzen]. The EPA had been working on a method of compliance since 1991. *Id.* at 42. In 1993, after at least one extension, a federal district court set December 15, 1993 as a deadline. *Id.* at 45.

15. Regulation of Fuel and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80.91 (1995).

16. Nichols, *supra* note 9, at 45-46.

17. *Id.* at 45; Summary of the Submission of the Government of the Republic of Venezuela to the WTO Dispute Settlement Panel in *United States—Measures on Gasoline*, at 2-3 (June 1995) [hereinafter Submission of Venezuela] (on file with the *Minnesota Journal of Global Trade*).

18. Nichols, *supra* note 9; Submission of Venezuela, *supra* note 17, at 2-3. Sulfur and olefins are chemical compounds. T90 is a distillation property. Specifically, it is the temperature at which 90% of gasoline evaporates, measured in Fahrenheit degrees. *Id.*

19. Nichols, *supra* note 9; Submission of Venezuela, *supra* note 17, at 2-3. The EPA did not include those three components in the statutory requirements due to a lack of data regarding their effects on the environment. Submission of the United States, *supra* note 3, ¶ 23; Submission of Venezuela, *supra* note 17, at 8. The EPA wanted to allow refineries to continue production and prepare for the future. The simple model approach thus seemed to be the best solution. *Id.* at 8.

ents — including sulfur, olefins, and T90 — must meet specific requirements for reformulated gasoline.<sup>20</sup>

Conventional gasoline, which accounts for approximately two-thirds of all gasoline consumed in the United States, need not be reformulated, but must maintain 1990 quality levels for all ingredients.<sup>21</sup> All properties, therefore, must meet non-degradation requirements. While the time period for the simple model was set at three years, no limit was placed on the conventional gasoline program.<sup>22</sup>

The non-degradation program, that certain constituents may not exceed 1990 levels, contains the discriminatory provision of the gasoline regulation.<sup>23</sup> Each refiner is assigned maximum amounts of ozone-forming ingredients that can be contained in the gasoline it sells. These maximum amounts are "baseline characteristics." The gasoline regulation sets levels for each gasoline constituent in a "statutory baseline" and also prescribes various methods for refiners to calculate their own, individual baselines.<sup>24</sup>

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20. *Id.* The baseline gasoline fuel properties are:

API Gravity	57.4
Sulfur, ppm	339.
Benzene, %	1.53
RVP, psi	8.7
Octane, R + M/2	87.3
IBP, F	91.
10%, F	128.
50%, F	218.
90%, F	330.
End Point, F	415.
Aromatics, %	32.0
Olefins, %	9.2
Saturates, %	58.8

42 U.S.C. § 7545(k)(10)(B)(i) (1988 & Supp. V 1993).

21. Submission of the United States, *supra* note 3, ¶ 28.

22. Submission of Venezuela, *supra* note 17, at 4.

23. Submission of the United States, *supra* note 3, ¶ 2. For RFG, non-degradation requirements only apply to sulfur, olefins, and T90. For conventional gasoline, however, all constituents are subject to the non-degradation requirements, which are set by the EPA in the gasoline regulation. The alleged discrimination in the conventional gasoline program therefore, applies to all gasoline components, and continues for an indefinite period of time, rather than a limited period, like the RFG program. See *supra* text accompanying notes 18-22.

24. Rules and Regulations, Environmental Protection Agency, 59 Fed. Reg. 7716, 7785 (1994) (to be codified at 40 C.F.R. § 80). The goals of the gasoline regulation include (1) avoiding options for refiners, which would allow them to choose between compliance techniques, and (2) obtaining accurate and reliable data. *Id.* The first goal responds to concerns that if refiners and importers

Any refiner, foreign or domestic, with adequate data on their 1990 gasoline components may set an individual baseline.<sup>25</sup> These baselines will equal the average levels of certain constituents in the refiner's own 1990 gasoline.<sup>26</sup> The vast majority of domestic and foreign refiners, however, lack the necessary records to calculate individual baselines,<sup>27</sup> because in 1990 there was no requirement to maintain such records.<sup>28</sup>

When actual data does not exist, domestic refiners may figure their individual baselines through modeling techniques that supplement missing data with more accessible, post-1990 information.<sup>29</sup> Foreign refiners, however, may not supplement missing data with the other modeling techniques. If they cannot compute the baseline using only 1990 records, they must follow the "statutory baseline," set out in the gasoline regulation.<sup>30</sup>

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could select which method to use, they would choose the simplest method, which likely would result in dirtier overall gasoline. *Id.* at 7785-86.

25. 40 C.F.R. § 80.91(b)(3) (1995). The use of the data is method 1 under the gasoline regulation: "Method 1-type data shall consist of quality (composition and property data) and volume records of gasoline produced in or shipped from the refinery in 1990, excluding exported gasoline." *Id.* § 80.91(c)(1)(i). "A refiner or importer must determine a baseline fuel parameter value using only Method 1-type data if sufficient Method 1-type data is available . . . ." *Id.* § 80.91(c)(4)(i).

26. *Id.* § 80.91(c)(1). In regard to the lack of records by importers, the EPA Assistant Administrator for Air and Radiation, Mary Nichols, said: "We expect that few, if any, importers will have adequate 1990 test data." Nichols, *supra* note 9, at 46.

27. Rules and Regulations, Environmental Protection Agency, 59 Fed. Reg. 7716, 7785 (1994) (to be codified at 40 C.F.R. § 80). Necessary records would include data on amounts and percentages of (1) volatile organic compounds, (2) oxides of nitrogen, (3) carbon monoxide, and (4) toxic air pollutants in gasoline sold in 1990. 42 U.S.C. § 7545 (k)(8)(A) (1988 & Supp. V 1993).

28. Submission of the United States, *supra* note 3, ¶ 33.

29. 40 C.F.R. § 80.91(c) (1995). The regulation provides:

Method 2-type data shall consist of 1990 gasoline blendstock quality data and 1990 blendstock production records . . . Method 3-type data shall consist of post-1990 gasoline blendstock and/or gasoline quality data and 1990 blendstock and gasoline production records . . . If a refiner has insufficient Method 1-type data for a baseline parameter value determination, it must supplement that data with all available Method 2-type data, until it has sufficient data . . . If a refiner has insufficient Method 1- and Method 2-type data for a baseline parameter value determination, it must supplement that data with available Method 3-type data, until it has sufficient data.

*Id.* § 80.91(c)(2)-(4).

30. *Id.* § 80.91(b)(4)(iii). This section provides: "An importer which cannot meet the criteria of . . . [the sections providing for use of adequate 1990 data, or for importers who are also foreign refiners] for baseline determination shall have the parameter values listed in section (c)(5) [the statutory baseline requirements]." *Id.*; see also *GATT Panel to Hear Venezuelan Complaint Against Clean Air Rules*, INSIDE U.S. TRADE, Oct. 7, 1994, at 4.

This statutory baseline represents the average level of the constituents contained in all gasoline consumed in the United States in 1990.<sup>31</sup>

The different baseline techniques require foreign refiners to meet average 1990 standards, which may require cleaner gasoline than they had previously produced. In contrast, U.S. refiners that produced dirtier gasoline than the 1990 average may continue to produce the dirtier gasoline, based on their individual baseline averages.<sup>32</sup>

Justifications for limiting use of individual baselines to domestic refiners include feasibility and enforcement.<sup>33</sup> The EPA considered modeling technically infeasible for foreign refiners. For instance, foreign sources and production processes have often changed since 1990, and the modeling methods are not designed to account for changes.<sup>34</sup> Also, establishing the refinery of origin would prove extremely difficult, because importers often mix gasoline from several refineries.<sup>35</sup> In addition, foreign refiners would need to keep separate data for the portion of gasoline destined for the United States. Foreign refiners and blenders do not have adequate data to set their own baselines under the modeling technique, and therefore, the EPA found individual baselines by foreign refiners to be infeasible. Enforcement problems arise because U.S. officials may inspect and monitor domestic refineries, but have no similar power over foreign refineries.<sup>36</sup>

Venezuela, as the largest exporter of gasoline to the United States, represents five percent of the U.S. gasoline market.<sup>37</sup> Venezuelan gasoline, however, contains nearly three times the percentage of olefins allowed for imported gasoline under the 1990 statutory baseline.<sup>38</sup> Venezuelan officials predicted that

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31. Nichols, *supra* note 9, at 46-47.

32. See *supra* notes 25-29 and accompanying text (detailing baseline requirements for U.S. refiners).

33. Rules and Regulations, Environmental Protection Agency, 59 Fed. Reg. 7716, 7785-86 (1994) (to be codified at 40 C.F.R. § 80).

34. *Id.*

35. *Id.*; Submission of the United States, *supra* note 3, ¶ 92.

36. Submission of the United States, *supra* note 3, ¶¶ 97, 98.

37. *EPA Announces Fuel Plan for Venezuela; Threatened GATT Complaint is Shelved*, 11 Int'l Trade Rep. (BNA) No. 13, at 504 (Mar. 30, 1994). The state-owned company, Petriols de Venezuela S.A. (PDVSA), exports to the U.S. through Citgo Petroleum Corporation.

38. *Id.* Venezuelan gasoline contains 29.8% olefins, but the statutory baseline, representing the average of all 1990 gasoline, limits olefins to 9.2% as of January 1, 1995. *Venezuela Files Request for Dispute Settlement Panel in Gasoline Issue*, 11 Int'l Trade Rep. (BNA) No. 11, at 429 (Mar. 16, 1994). Ironically,

their RFG exports would decrease by \$150 million per year due to the baseline rule.<sup>39</sup>

Venezuela raised a challenge to the differing baseline standards before the EPA issued the gasoline regulation in 1993.<sup>40</sup> The EPA, however, did not have time to address the Venezuelan challenge before the court-imposed deadline for the gasoline regulation.<sup>41</sup> EPA officials fully expected to pursue negotiations after issuing the regulation.<sup>42</sup> In 1994, under threat of a GATT challenge, the EPA and Venezuela reached a compromise which would have allowed Venezuela to use the same modeling method of setting individual baselines for RFG as U.S. refiners.<sup>43</sup> In exchange, Venezuela agreed to withdraw any GATT challenge and limit its quantity of U.S. gasoline exports to 1990 levels.<sup>44</sup>

The Office of the U.S. Trade Representative (USTR) supported the EPA compromise.<sup>45</sup> USTR officials emphasized that it affected only the simple model under the RFG program, spanning three years.<sup>46</sup> Several U.S. senators and environmental or-

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PDVSA modified its refineries to reduce olefin content below the level in its 1990 gasoline. Nichols, *supra* note 9, at 48. If they were allowed to model, therefore, modifications would not be necessary. *See id.* at 44-53.

39. *Venezuela Moves Toward WTO Case in Reformulated Gas Dispute*, INSIDE U.S. TRADE, Feb. 3, 1995, at 4.

40. Katzen, *supra* note 14, at 45-46.

41. Nichols, *supra* note 9, at 49.

42. *Id.*

43. Proposed Rules, Environmental Protection Agency, 59 Fed. Reg. 22,800, 22,801 (1994) (to be codified at 40 C.F.R. § 80). The EPA proposal provided that:

While EPA does not necessarily agree with PDVSA position on GATT requirements, EPA desires to remove the uncertainty in this regard and we believe the proposal does that in a manner fully protective of human health and the environment. . . . Under today's proposal importers would be allowed limited use of a baseline established for an individual foreign refinery . . . .

*Id.*

44. *Improper White House Pressure Prompts EPA Plan for Venezuela, Baucus Charges*, 11 Int'l Trade Rep. (BNA) No. 17 at 659, 659-60 (Apr. 27, 1994). Although Venezuela agreed to cap exports at 1990 levels, experts have noted that Venezuelan exports to the U.S. were 200% higher in 1990 than in 1993. *Id.* Venezuela, therefore, did not sacrifice at all when making this bargain, since it is unlikely their gasoline exports to the United States would have been higher than in 1990 even without the compromise requirement. Also, the import cap would appear to contradict the Agreement on Safeguards.

45. *EPA Announces Fuel Plan for Venezuela*, *supra* note 37.

46. *USTR Official Says Deal With Venezuela on Reformulated Gasoline is Temporary*, 11 Int'l Trade Rep. (BNA) No. 14, at 549 (Apr. 6, 1994). By 1998 all refiners of RFG must meet the same statutory standards for pollutant quantities, and individual baselines will no longer apply. *Id.* The proposal did not affect the conventional gasoline program.



ganizations, however, spoke out against the compromise,<sup>47</sup> noting several problems. First, they charged that the compromise would result in lower air quality, in direct conflict with the goal of the 1993 gasoline regulation.<sup>48</sup> Second, senators opposed the agreement because the EPA developed it secretly, in contrast to the usual U.S. rule-making procedure.<sup>49</sup> Third, many showed skepticism because the compromise included a quota provision, which free trade proponents generally disfavor.<sup>50</sup> In September 1994, Congress halted funding for the proposed compromise regulation, effectively leaving the EPA no choice but to abandon it.<sup>51</sup>

With the defeat of the EPA compromise, Venezuela brought the dispute before the WTO,<sup>52</sup> charging that the gasoline regulation violates Article III of the GATT, as well as Article I and the Technical Barriers to Trade Agreement.<sup>53</sup> USTR officials defended the EPA gasoline regulation, claiming that it does not violate GATT, or, alternatively, that Article XX justifies any violations.<sup>54</sup>

## B. OVERVIEW OF GATT JURISPRUDENCE

Obligations under the GATT limit the ability of contracting countries to enact environmental policies which may have a dis-

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47. *Baucus to Investigate EPA Plan on Venezuelan Reformulated Fuel*, 11 Int'l Trade Rep. (BNA) No. 15 at 584 (Apr. 13, 1994). Senator Max Baucus (Montana) and the rest of the Senate Environmental and Public Works Committee decided to investigate the EPA/Venezuela compromise. *Id.*

48. Steve Charnovitz, Symposium, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 522 (1994); *Plan for Venezuelan Reformulated Fuel Will Undergo Investigation, Senator Says*, Env't Rep. (BNA) No. 19, at 2072 (Apr. 8, 1994).

49. *EPA Announces Fuel Plan for Venezuela*, *supra* note 37.

50. Charnovitz, *supra* note 48, at 522. The cap on Venezuelan imports constitutes the quota provision. *But see supra* note 44.

51. *Venezuela Plans Challenge in GATT Protesting U.S. Reformulated Gas Rule*, *supra* note 7, at 1442. The USTR defended the EPA compromise as a proposal, rather than a final resolution. *See Nichols, supra* note 9, at 26-33. Comments from many sources, including Venezuela, later concluded the compromise would have been infeasible for foreign refiners. Submission of the United States, *supra* note 3, ¶ 101.

52. *Venezuela Moves Toward WTO Case in Reformulated Gas Dispute*, *supra* note 39, at 4.

53. Submission of Venezuela, *supra* note 17, at 5.

54. *RFG Imports Hearings Begin This Week, as U.S. Sends Volley*, OCTANE Wk., July 10, 1995, available in WESTLAW, Octanewk database; *U.S. Defends Gas Rules in WTO Against Charges of Discrimination*, INSIDE U.S. TRADE, July 7, 1995, at 8-9.

criminatory effect on trade.<sup>55</sup> Disputes between environmentalists and proponents of free trade have arisen in several contexts.<sup>56</sup> Environmentalists claim that trade obligations limit the government's ability to control polluting companies and products, and that this inability renders many environmental laws useless.<sup>57</sup> Challenges to environmental laws have had a high rate of success under the GATT.<sup>58</sup> For example, two GATT panels found the challenged regulation in the Tuna/Dolphin dispute to violate the GATT.<sup>59</sup> An environmental dispute concerning product standards arguably had not arisen, however, until the U.S. gasoline regulation challenge.<sup>60</sup>

Environmental groups such as the Center for International Environmental Law (CIEL) supported a strong U.S. stance in defending the gasoline regulation.<sup>61</sup> CIEL stated that the U.S. rule properly protects the environment for purposes of health and safety, and that any WTO ruling in favor of Venezuela would constitute a serious overreaching of its scope.<sup>62</sup>

GATT Article III:4 prohibits adverse discrimination against foreign products as compared to similar domestic products.<sup>63</sup>

55. Charnovitz, *supra* note 48, at 467.

56. William Snape III & Naomi Lefkovitz, Symposium, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777, 777-82 (1994).

57. Charnovitz, *supra* note 48, at 468-70.

58. *Id.* at 469. In six out of nine disputes challenging government measures claimed to have been "environmental," the party complaining that the environmental regulation violated the GATT has been successful. Those regulations include import bans on tuna, herring, and cigarettes. The three regulations which have been upheld as legal took the form of either a border tax adjustment or an excise tax. *Id.*

59. *Id.* Under GATT, a country may regulate imported products, but it may not regulate the process of obtaining and making the imported product. GATT Dispute Resolution Panel, *United States—Restrictions on Imports of Tuna From Mexico*, GATT Doc. DS21/R, BISD 39th Supp. 155, ¶¶ 5.13-5.15 (1993).

60. Charnovitz, *supra* note 48, at 469.

61. *Environmentalists Seek Strong Defense to Venezuela WTO Challenge*, INSIDE U.S. TRADE, May 19, 1995, at 19.

62. *Id.* at 19-20.

63. Article III:4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use

.....  
GATT, *supra* note 6, art. III:4.

Several GATT dispute panels have interpreted Article III, which provides for national treatment of imported products.

To decide if Article III applies, panel members ask whether the law or regulation at issue differentiates between like products of foreign and domestic origin.<sup>64</sup> Facially discriminatory regulations which differentiate, by their language, between foreign and domestic like products, clearly fall within the scope of Article III:4. In *Canada — Administration of the Foreign Investment Review Act*, the Panel found clear discrimination on the face of the statute; it concluded that the provision “exclude[d] the possibility of purchasing available imported products so that the latter are clearly treated less favorably than domestic products and that such requirements are therefore not consistent with Article III:4.”<sup>65</sup>

Panels will not automatically invalidate discriminatory treatment. If the panel finds differentiation between like products, it asks whether the discrimination adversely affects the foreign product. In cases involving facially discriminatory treatment, the defending party must meet a high standard of proof to show that the different treatment neutralizes an otherwise adverse effect. Panels have interpreted Article III:4 to require, therefore, that competitive conditions be equal for both foreign and domestic like products.<sup>66</sup>

For example, the regulation in *EEC — Measures on Animal Feed Proteins*, which required administrative documentation for imported products but not domestic products, constituted formal

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64. See, e.g., GATT Dispute Resolution Panel, *Canada—Administration of the Foreign Investment Review Act*, GATT Doc. L/5504, BISD 30th Supp. 140 ¶ 5.7 (1984) (panel report adopted Feb. 7, 1984).

65. *Id.* at ¶ 5.8. The dispute considered several regulations restricting transactions in Canada. For instance, Canada had made undertakings to purchase goods of Canadian origin. *Id.* ¶ 5.7.

66. See, e.g., GATT Dispute Resolution Panel, *Italian Discrimination Against Imported Agricultural Machinery*, GATT Doc. L/833, BISD 7th Supp. 60 (1959) (panel report adopted Oct. 23, 1958); GATT Dispute Resolution Panel, *Canada—Administration of the Foreign Investment Review Act*, GATT Doc. L/5504, BISD 30th Supp. 140 (1984) (panel report adopted Feb. 7, 1984); GATT Dispute Resolution Panel, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT Doc. DS17/R, BISD 39th Supp. 27 (1993) (panel report adopted Feb. 18, 1992); GATT Dispute Resolution Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R BISD 39th Supp. 206 (1993) (panel report adopted June 19, 1992).

discrimination.<sup>67</sup> The Panel went on to conclude, however, that the administrative requirements did not afford less favorable treatment to foreign products.<sup>68</sup> The Panel, therefore, accepted the differentiation as a way to prevent adverse effects.

In *United States — Section 337 of the Tariff Act of 1930*, a GATT panel analyzed equal competitive conditions. The complaining party challenged the different U.S. procedures for intellectual property disputes involving foreign products, as opposed to disputes involving domestic products.<sup>69</sup> The Panel interpreted the “no less favorable” clause of Article III:4 to mean that “the mere fact that imported products are subject . . . to legal provisions that are different from those applying to products of national origin is in itself not conclusive.”<sup>70</sup> The Panel explained that “there may be cases where application of formally identical legal provisions would in practice accord less favorable treatment to imported products.”<sup>71</sup>

In another recent GATT dispute, the United States argued that a Canadian provision restricting the private delivery of foreign beer violated the national treatment clause.<sup>72</sup> Canada defended the law by arguing that although the regulations for foreign and provincial beer differed, the discrimination did not constitute less favorable treatment.<sup>73</sup> The Panel found that the “mere fact that imported and domestic beer were subject to different delivery systems was not, in itself, conclusive in establishing inconsistency with Article III:4.”<sup>74</sup> The Panel placed the burden of proof on Canada to show that foreign and domestic beer enjoyed equal competitive opportunities.<sup>75</sup> The Panel concluded that since foreign brewers did not have the same options

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67. GATT Dispute Resolution Panel, *EEC—Measures on Animal Feed Proteins*, GATT Doc. BISD 25th Supp. 49 ¶ 4.72 (1978) (panel report adopted Mar. 14 1978).

68. *Id.* The treatment was not less favorable, because additional administrative requirements were placed on domestic producers, so that the effect of the differentiation in the disputed regulation made competitive conditions equal, rather than allowing an advantage to foreign producers. *Id.*

69. GATT Dispute Resolution Panel, *United States—Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439 BISD 36th Supp. 345 ¶ 1.3 (1990) (panel report adopted Nov. 7, 1989).

70. *Id.* ¶ 5.11.

71. *Id.*

72. GATT Dispute Resolution Panel, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT Doc. DS17/R, BISD 39th Supp. 27 (1993) (panel report adopted Feb. 18, 1992).

73. *Id.* ¶ 5.11.

74. *Id.* ¶ 5.12.

75. *Id.* ¶ 5.12, 5.14.

as domestic brewers, they were placed at a competitive disadvantage in violation of Article III:4.<sup>76</sup>

If a violation of a GATT provision, such as Article III:4, has been shown, panels will consider possible justifications under Article XX.<sup>77</sup> Article XX allows countries to adopt measures in violation of the GATT, if such measures are "necessary" for the protection of life or health, enforcement of other laws, or preservation of natural resources. The country invoking the exception has the burden of proof under Article XX.<sup>78</sup>

Article XX(d) does not justify a regulation, inconsistent with Article III, if an alternative, non-violative measure exists.<sup>79</sup> Even if no GATT consistent method exists, the regulation is not necessary under Article XX(d) if a less inconsistent measure is available.<sup>80</sup> In other words, the measure is not "necessary" if the party reasonably could be expected to use a GATT consistent or less GATT inconsistent means of bringing about the result.<sup>81</sup> In the *Thailand Cigarette* case, the Panel stated that "neces-

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76. *Id.* ¶ 5.14, 5.16. The Panel also considered minimum prices set by Canada on beer in certain provinces. *Id.* ¶ 5.27. The Panel determined that although the minimum prices were equal for domestic and foreign products, they did not accord equality of competitive conditions. Some foreign beer could be sold more cheaply than the minimum, so the regulation had the effect of denying their competitive advantage. *Id.* ¶ 5.30.

77. See, e.g., GATT Dispute Resolution Panel, *United States—Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439 BISD 36th Supp. 345 ¶ 5.9 (1990) (panel report adopted Nov. 7, 1989). Article XX provides:

[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .

(b) necessary to protect human, animal or plant life or health; . . .

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . .

GATT, *supra* note 6, at art. XX.

78. GATT Dispute Resolution Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R BISD 39th Supp. 206 ¶ 5.41 (1993) (panel report adopted June 19, 1992).

79. GATT Dispute Resolution Panel, *United States—Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439 BISD 36th Supp. 345 ¶ 5.26 (1990) (panel report adopted Nov. 7, 1989).

80. *Id.* "[I]n cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions." *Id.*

81. *Id.*

sary" under Article XX(b) should be interpreted the same as under Article XX(d).<sup>82</sup>

## II. UNITED STATES — STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE

Venezuela focused its challenge on adverse discrimination under Article III:4. In evaluating the Article III:4 claim, the WTO Panel found that the regulation affected the use of goods.<sup>83</sup> The Panel then turned to the issue of whether the EPA regulation treats foreign gasoline less favorably than domestic gasoline.<sup>84</sup> Venezuela argued that the regulation leaves them only two choices. First, they can make changes in their refining, which would be extremely costly, and would adversely affect their competitive position in the U.S. market.<sup>85</sup> Second, they can sell their "dirty" gasoline to an importer as blendstock gasoline. Because the importer must have enough cleaner gasoline to offset its dirtier gasoline, so that the average quality conforms with the statute, blendstock is purchased at a much lower price.<sup>86</sup> Venezuela argued that setting an individual baseline through modeling would be an easier option, since they would not have to alter inputs, processes, or physical plant condi-

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82. GATT Dispute Resolution Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37th Supp. 200, ¶ 74 (panel report adopted Nov. 7, 1990). It used a reasonable standard and stated that the measure would be necessary "only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives." *Id.* ¶ 75. The Panel decided a regulation to ban the importation of cigarettes for health reasons violated Article XX(b). *Id.* ¶ 81.

83. Gasoline Decision, *supra* note 8, ¶ 6.5.

84. *Id.* Before analyzing less favorable treatment, the Panel decided that foreign and domestic gasoline constitute like products. *Id.* ¶ 6.9. Although both parties seemed to have conceded like product, the Panel addressed the U.S. assertion that the gasoline regulation treats similarly situated parties similarly as an argument against like product. *Id.* ¶ 6.6. The Panel refused, however, to substitute a similarly situated test for the traditional like product test, which compares the products based on factors such as nature, quality, and use. *Id.* ¶ 6.8. The Panel relied on the traditional like product test set forth in the 1987 *Japan Alcohol* case. *Id.* Unaccountably, the Panel ignored other, more recent panel reports, which applied a different test for like product. *See infra* note 109.

85. Submission of Venezuela, *supra* note 17, at 9.

86. *See id.* at 9-10. Brazil also argued that the regulation violated Article III:4, because they only could sell their gasoline as blendstock, and thus earn less. Gasoline Decision, *supra* note 8, ¶ 3.16.

tions.<sup>87</sup> Venezuela also claimed that the United States itself had repeatedly recognized the adverse effects of the discrimination.<sup>88</sup> For example, Mary Nichols, the EPA Assistant Administrator for Air and Radiation, admitted to the U.S. Congress that the regulation discriminated against foreign refiners.<sup>89</sup>

As a defense to the Article III:4 claim, the United States argued that the rule does not treat importers and domestic refiners differently "overall."<sup>90</sup> Since the baseline for importers equals the average quality of all 1990 U.S. gasoline, roughly half of U.S. gasoline will be cleaner than the foreign gasoline.<sup>91</sup> The Panel rejected the U.S. "overall equal" argument by applying the reasoning of the *Section 337* case, which said that more favorable treatment cannot be balanced with less favorable treatment to achieve an equal result.<sup>92</sup>

The USTR officials also argued that the different treatment does not result in less favorable treatment.<sup>93</sup> They claimed that most foreign refiners do not have adequate data to use modeling techniques and would therefore be forced out of the market under an individual baseline system.<sup>94</sup> The statutory baseline,

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87. Submission of Venezuela, *supra* note 17, at 10. This solution is what the EPA compromise allowed. The PDVSA has shown it could determine an individual baseline, would allow for monitoring of compliance, and could figure the refinery-of-origin. *Id.* at 17.

88. *Id.* at 11.

89. She stated:

[T]he issue that we've been trying to focus on . . . is do we have an adequate justification for *discriminating against one category of refiners, that is foreign refiners against domestic refiners*. . . . Clearly, Venezuela prefers to use its own baseline rather than to use the average baseline provided under the December rule, because they will then have to do only the same amount of reformulating that they had planned to do if they were treated the same as domestic refiners.

*Id.* at 12 (quoting *Oversight of the Reformulated Gasoline Rule: Hearing Before the Committee on Environment and Public Works United States Senate*, 103d Cong., 2nd Sess. 15, 22-23 (1994) (statement of Mary D. Nichols, Assistant Administrator, EPA) (emphasis added)).

90. Submission of the United States, *supra* note 3, ¶ 47; PDVSA, *Feds Fight it Out Over RFG Baseline Rule*, 32 U.S. OIL WK., July 17, 1995, available in WESTLAW, USOilwk database.

91. Submission of the United States, *supra* note 3, ¶ 47, 48.

92. Gasoline Decision, *supra* note 8, ¶ 6.14.

93. Submission of the United States, *supra* note 3, ¶¶ 47-50.

94. *Id.* ¶ 52-56 Importers, blenders, and domestic refiners with limited businesses in 1990 are similarly situated in their lack of information for modeling. None of them have reliably established 1990 gasoline qualities. *Id.* ¶ 52. Blenders and importers have inadequate data for methods 2 and 3 of the modeling techniques, because they rely on a multitude of sources. *Id.* ¶ 54. Refinery of origin problems, and varying gasoline quality and sources mean subsequent

therefore, may actually help some foreign refiners export gasoline to the United States.

The Panel agreed with the Venezuelan position and decided that the regulation constitutes adverse discrimination by reducing opportunities for some that are available for others, thereby worsening their competitive condition.<sup>95</sup>

The United States further argued that three provisions of Article XX apply and provide justifications for GATT violations.<sup>96</sup> The WTO Panel, however, rejected the defenses.<sup>97</sup> The Panel dismissed the arguments raised under Article XX(d) and XX(g) rather quickly and devoted most of its attention to Article XX(b).<sup>98</sup>

The United States argued the discriminatory effects of the gasoline regulation are justified under Article XX(b), as the only available means to enforce the CAA amendments, which are necessary to protect human life and health.<sup>99</sup> The Panel listed three elements the regulation must satisfy under Article XX(b): (1) the regulation must fall within the policies that XX(b) was designed to cover; (2) the regulation must be necessary for the protection of life or health; and (3) the regulation must meet the requirements of the introductory clause of Article XX.<sup>100</sup> The Panel agreed with the parties that the first element had been

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data would not accurately show 1990 quality. *Id.* By contrast, domestic gasoline has a consistent source and quality. *Id.* ¶ 55.

95. Gasoline Decision, *supra* note 8, ¶ 6.10.

96. Submission of the United States, *supra* note 3, ¶¶ 69-128.

97. Gasoline Decision, *supra* note 8, ¶ 8.1.

98. Gasoline Decision, *supra* note 8. Under Article XX(d) the United States cited problems with enforcement and "gaming." Submission of the United States, *supra* note 3, ¶ 117, 120. Gaming is the fear that if refiners were allowed to choose whether to model or to follow the statutory baseline, the environment would suffer from each refiner choosing the less stringent method. See Nichols, *supra* note 9, at 47-48. For Article XX(d), the Panel decided the regulation was not covered by that section, because the regulation was not an enforcement mechanism of the CAA, but simply rules for determining baselines. It facilitated compliance, rather than enforced it. Gasoline Decision, *supra* note 8, ¶ 6.33.

Under Article XX(g) the United States argued clean air is an exhaustible natural resource. *Id.* ¶ 6.36. The Panel decided that Article XX(g) covered the gasoline regulation, but was not satisfied to allow the discrimination, because the discriminatory features of the regulation were not "primarily aimed at" conserving clean air. *Id.* ¶ 6.40. In its appeal, the USTR will focus on its Article XX defense. *Administration Appeals WTO Decision on U.S. Gasoline Regulations*, *supra* note 8, at 13.

99. Submission of the United States, *supra* note 3, ¶ 71.

100. Gasoline Decision, *supra* note 8, ¶ 6.20.



satisfied<sup>101</sup> and then considered whether the means chosen to bring about the goals of the CAA were "necessary" for the fulfillment of the environmental purpose.<sup>102</sup>

The Panel called attention to the *Section 337* case in which the Panel defined "necessary" under Article XX as an absence of an alternative measure which the country could reasonably be expected to employ.<sup>103</sup> If all methods reasonably available would be GATT inconsistent, the country should use the least inconsistent method.<sup>104</sup> Thus, if either consistent or less inconsistent alternatives existed, the regulation could not be considered necessary.<sup>105</sup>

The gasoline Panel concluded that either of two alternative techniques would be reasonable. The United States could set a single statutory baseline, or allow all refiners to set individual baselines.<sup>106</sup> The Panel found that the United States had not satisfied its burden of showing that foreign refiners could not set individual baselines,<sup>107</sup> or that enforcement problems made the regulation necessary.<sup>108</sup>

The Panel decided it need not consider the third element of Article XX(b), whether the regulation fit within the introductory clause of the Article. It also did not consider the claims brought by Venezuela under Article I:1 of the GATT and under the Technical Barriers to Trade Agreement.<sup>109</sup>

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101. *Id.* ¶ 6.21

102. *Id.* ¶ 6.22.

103. *Id.* ¶ 6.24.

104. *Id.*

105. *Id.* ¶ 6.24.

106. *Id.* ¶ 6.25. The United States claimed the individual baselines were a "logical and practical" way to carry out the CAA. Submission of the United States, *supra* note 3, ¶ 79. If a single baseline were required, the results would be the same, an average quality equal to the average in 1990 gasoline. *Id.* A greater number of refiners, however, would need to adjust procedures.

The United States argued that the regulation limits the use of individual baselines to domestic refiners for feasibility and enforcement reasons. *Id.* ¶¶ 92-95. Many importers do not have enough data to calculate the baselines, and also would have trouble accounting for the refinery of origin of the gasoline. *Id.* ¶ 92. In addition, they argued that they could not adequately enforce compliance with an individual baseline program for importers. *Id.* ¶ 95.

107. Gasoline Decision, *supra* note 8, ¶ 6.26.

108. The United States has available data of importers regarding gasoline quality. The Panel decided that the United States did not show that this data was inherently unreliable to enforce compliance. *Id.* ¶ 6.28.

109. *Id.* ¶¶ 6.29, 6.19, 6.43. By avoiding the TBT issue, the Panel escaped some unanswered and potentially troubling questions, such as what constitutes a technical regulation, whether a discriminatory measure connected to a technical regulation is covered by the TBT, and whether GATT Article XX is applicable under the TBT.

### III. ANALYSIS OF ISSUES ARISING UNDER THE GASOLINE DISPUTE

The Panel's decision adequately disposes of the rather narrow issue presented by the facts. The dispute, however, also raises some interesting questions about GATT's broader impact on environmental regulation. Although the Panel was not called upon to address these issues, this Note will attempt to explain the broader issues and to comment upon them.

#### A. ANALYSIS OF THE PANEL DECISION

##### 1. The Gasoline Regulation Violates Article III:4

The WTO Panel followed prior panels when it considered the Article III:4 claim.<sup>110</sup> It first found that the regulation affected the sale or use of gasoline. It then decided that domestic and foreign gasoline constituted like products, a conclusion conceded by both parties.<sup>111</sup>

Having found these products to be like, the Panel had little difficulty finding discrimination between foreign and domestic gasoline. The gasoline regulation, by its terms, provides different rules based on the origin of the gasoline. The different baseline requirements constitute adverse discrimination, because they result in costly effects for foreign refiners, such as Venezuela, but do not have a similar effect on domestic refiners.<sup>112</sup> With the different baseline requirements, Venezuela estimates its gasoline exports will be reduced by \$150 million per year.<sup>113</sup>

The United States argued that the regulation does not discriminate against importers "overall." Because the statutory baseline represents average 1990 gasoline standards, half of all the 1990 gasoline should fall above the standard, and half

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110. See *supra* notes 63-76 and accompanying text (outlining the Panels' Article III decisions).

111. Gasoline Decision, *supra* note 8, ¶ 6.5. Although it was not necessary, the Panel included an extensive dictum about the definition of the term "like product." *Id.* ¶¶ 6.5-6.9. The Panel's discussion on this point is likely to engender some confusion over the correct definition, as is explained at length in another note in this issue. See James Snelson, *Can GATT Article III Recover From Its Head-On Collision with United States: Taxes on Automobiles?*, 5 MINN. J. GLOBAL TRADE 467 (1996). The Panel here articulated an older like product test, found in the 1987 *Japan Alcohol* case, a test which has since been rejected by several more recent GATT panels. Gasoline Decision, *supra* note 8, ¶ 6.8.

112. See *supra* notes 83-95 and accompanying text (detailing the Panel's analysis of less favorable treatment under the gasoline regulation).

113. *GATT Panel to Hear Venezuelan Complaint Against Clean Air Rules*, INSIDE U.S. TRADE, Oct. 7, 1994, at 4.

should fall below.<sup>114</sup> Even accepting that logic, however, the regulation would still adversely affect half of the foreign gasoline, namely the gasoline on the dirtier side of the average. None of the U.S. refiners, however, will be impacted in such a way, since they need not comply with the statutory average.<sup>115</sup> The regulation does not require any adjustments of processes or conditions by domestic refiners, regardless of which side of the average they represent. The costs that Venezuela and other foreign refiners must bear leaves them in a worse competitive position than domestic refiners, and thus the regulation violates Article III:4.<sup>116</sup>

## 2. The Panel's Approach to the Gasoline Regulation Under Article XX

Since the regulation clearly violates Article III:4, the gasoline dispute revolved around the issues that arise under Article XX, and particularly Article XX(b). The United States' most powerful and persuasive arguments lie in their affirmative defenses. This section will focus on Article XX(b), and consider the reasons for the Panel's conclusion that the United States did not meet its burden of proof under that article.<sup>117</sup>

The Panel found that the gasoline regulation was clearly aimed at protecting life or health, as required by Article XX(b).<sup>118</sup> Studies showed many harmful effects of ozone-forming emissions from gasoline, prompting the United States to en-

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114. Submission of the United States, *supra* note 3, ¶ 47.

115. See *supra* note 32 and accompanying text.

116. The issue of adverse effect was not a difficult one. In cases where a regulation openly discriminates against foreign goods, previous GATT panels have ruled that any degree of adverse impact violates Article III. See, e.g., GATT Dispute Resolution Panel, *United States—Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439, BISD 36th Supp. 345 (1990) (panel report adopted Nov. 7, 1989); GATT Dispute Resolution Panel, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT Doc. DS17/R, BISD 39th Supp. 27 (1993) (panel report adopted Feb. 18, 1992); see also *supra* notes 63-76 (explaining the Panel's opinion with respect to Article III). Interestingly, the U.S. Supreme Court subjects discriminatory state legislation to similar "strict scrutiny." See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV., 1401, 1412 (1994).

117. The Panel was correct in examining only Article XX(b) and dismissing Article XX(d) and XX(g) more quickly. See Gasoline Decision, *supra* note 8, ¶¶ 6.33, 6.40. This Note, therefore, will not discuss the application of those provisions to this dispute. See *supra* note 98 (describing the Panel's treatment of Article XX(d) and XX(g)).

118. *Id.* ¶ 6.21; see generally 59 Fed. Reg. 7716, 7785, 7785-88 (1994) (to be codified at 40 C.F.R. § 80) (proposed Feb. 16, 1994).

act the 1990 CAA amendments.<sup>119</sup> The gasoline regulation simply facilitates that statute, allowing it to fulfill its environmental purpose.

The main issue under Article XX was whether a GATT violation was necessary to effectuate that purpose. Several panel decisions have held that the issue of "necessary" under Article XX(d) is a question of reasonable alternatives.<sup>120</sup> The question of necessity depends on (1) whether the country had any GATT consistent, or less GATT-inconsistent alternative, and (2) whether the country could reasonably be expected to use that alternative method.

The United States did have one clearly GATT-consistent alternative available. That method would involve a single statutory standard, based on the average quality of 1990 gasoline. The standard would eliminate the discrimination of the gasoline regulation by requiring both domestic refiners and importers to follow the same baseline, which the current regulation only requires importers to use. A single statutory baseline would have no discriminatory trade effects, and would be technically feasible.

Venezuela and Brazil have also argued that the United States had another alternative that would eliminate the discriminatory effects of the regulation.<sup>121</sup> All refiners, under that alternative, would be required to calculate individual baselines using 1990 data and the modeling technique. If a refiner technically could not calculate a baseline, even with modeling, that refiner would follow the statutory baseline instead. Some refiners, such as the PDVSA, the state-owned Venezuelan refinery, have argued that they have sufficient data to construct individual baselines through modeling.<sup>122</sup> This program would put them in an equal competitive position with domestic refiners.<sup>123</sup>

The United States argued that the option was not technically feasible, because foreign refiners could not prove an individual baseline.<sup>124</sup> The Panel, however, disagreed.<sup>125</sup> While it was likely difficult for the Panel to dispute the United States on

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119. See *supra* note 3 (detailing harmful effects of emissions).

120. See *supra* notes 77-82 (examining GATT panel decisions under Article XX).

121. Gasoline Decision, *supra* note 8, ¶¶ 3.45, 3.46.

122. *Id.*

123. The Panel seemed to regard this option as less inconsistent with GATT, and at one point said it would be consistent. *Id.* ¶ 6.25.

124. Submission of the United States, *supra* note 3, ¶ 50.

125. Gasoline Decision, *supra* note 8, ¶ 6.26.

this technical point, the Panel may have been influenced by the fact that the United States had nearly adopted a regulation implementing this type of program for Venezuela,<sup>126</sup> and that the United States has the burden of proof for Article XX justifications.<sup>127</sup> Though the United States could be correct, the Panel found that they had not adequately proved that this alternative was technically infeasible.<sup>128</sup> Thus, if this alternative was available, and if it was either GATT-consistent or less inconsistent, the United States could not claim its discriminatory method was "necessary."

#### B. THE BROADER ISSUES UNDER THE INDIVIDUAL BASELINE ALTERNATIVE

The issue lurking just below the surface of the case was whether the U.S. gasoline regulation would have been GATT-consistent if it had allowed importers to use the same rule as domestic refiners: individual baselines for those who have the data and statutory baselines for those who do not. The Panel did say, almost in passing, that it thought such a proof standard would be consistent with GATT Articles III and I.<sup>129</sup>

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126. See *supra* notes 43-51 (describing the debate over the compromise proposal). Although the proposal failed in Congress, EPA officials supported it. See *supra* note 43. The United States, however, maintains that it could not have worked for technical reasons. Submission of the United States, *supra* note 3, ¶ 101.

127. See, e.g., GATT Dispute Resolution Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R, BISD 39th Supp. 206, ¶ 5.41 (1993) (panel report adopted June 19, 1992).

128. Gasoline Decision, *supra* note 8, ¶ 6.26.

129. *Id.* ¶ 6.25. In that paragraph the Panel report states:

The Panel noted finally that a regulatory scheme using foreign refiner baselines, to the extent that it did not distinguish between imported gasoline on the basis of its country of origin, *would not necessarily contravene Article I or other provisions* of the General Agreement, and that the United States, notwithstanding suggestions that certain importers might have equitable concerns, had not established the contrary.

*Id.* (emphasis added). This paragraph, however, conflicts with an earlier statement in the Panel report, which reads:

The Panel observed that the distinction in the Gasoline Rule between refiners on the one hand, and importers and blenders on the other, which affected the treatment of imported gasoline with respect to domestic gasoline, was related to certain differences in the characteristics of refiners, blenders and importers, and the nature of the data held by them. However, Article III:4 of the General Agreement deals with the treatment to be accorded to like products; its wording *does not allow less favourable treatment dependent on the characteristics of the producer* and the nature of the data held by it.

*Id.* ¶ 6.11. (emphasis added).

This alternative of individual baselines for everyone raises two sets of problems. First, several earlier panel reports have ruled that GATT Article III does not permit governments to discriminate between like products based on factors that relate to the character of the manufacturer rather than the character of the product.<sup>130</sup> An individual baseline method would accept or reject gasoline based on past performance of each individual refiner. The gasoline Panel's statement that this regulation would not violate Article I and Article III appears to conflict with those holdings. Certainly, if GATT wishes to reconsider those holdings, or to distinguish this case from them, a more extended analysis is required. As GATT precedents now stand, individual baselines would violate Article III.

The second question that would arise concerns whether the United States could justify the individual baseline method by saying that it is necessary under Article XX to achieve the environmental purpose in question. A decision of necessity would be based on alternatives.<sup>131</sup> The United States clearly has a GATT-consistent alternative in the 1990 statutory baseline method. That method would also be the least trade distortive. The United States would argue, however, that the 1990 statutory baseline was not a reasonable alternative, because the features of the individual baseline method were necessary to accomplish the environmental objective. Only if the Panel accepted that argument could an individual baseline program withstand a GATT challenge, as the least GATT-inconsistent method.

#### C. THE ARTICLE XX REASONABLENESS STANDARD AND POLITICAL NECESSITY

The United States clearly had options other than the discriminatory gasoline regulation, at least one of which would be technically feasible. The entire gasoline dispute, then, turns on the question of reasonableness. GATT panels interpreting Article XX have often stated the "reasonable alternative" standard,

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130. See GATT Dispute Resolution Panel, *United States—Restrictions on Imports of Tuna From Mexico*, GATT Doc. DS21/R, BISD 39th Supp. 155 (1993). GATT Dispute Resolution Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R, BISD 39th Supp. 206, (1993) (panel report adopted June 19, 1992); *supra* note 59 and accompanying text (discussing the *Tuna* decision).

131. See *supra* notes 79-81 and accompanying text (describing the Article XX standard).

but none have clearly defined it.<sup>132</sup> The gasoline dispute Panel could have clarified "reasonable," but failed to do so.

Though a statutory baseline standard would be the most trade neutral approach, the United States had valid reasons for rejecting it. Possible U.S. justifications for the discrimination include (1) fairness to refiners and (2) political acceptance.<sup>133</sup> Currently WTO panels only consider technical problems as justifications for discrimination. Perhaps, however, problems of equity and political acceptability should be considered as well.

As a matter of equity, the EPA chose the individual baseline method, over the strictly statutory method to reduce the burden on domestic refiners with dirtier than average gasoline.<sup>134</sup> Since both the individual baseline and statutory baseline methods would achieve the same result in terms of gasoline cleanliness, they should implement the less burdensome method.<sup>135</sup> A statutory baseline would affect every refiner on the dirty side of the average adversely, because they would need to adjust production processes to meet the guidelines, or sell their gasoline at a lower price, so that it can be blended with offsetting clean gasoline.<sup>136</sup> Refiners with gasoline that already meets or exceeds the statutory baseline, however, would not be affected by the regulation. Certain refiners, therefore, would bear the entire burden of the regulation. With individual baselines, however, no refiner is adversely affected, unless, of course, their gasoline quality is worse than 1990 levels. The individual baseline method, therefore, appears to be the least disruptive means of achieving the goals of the CAA. Further, the effects of some gasoline components on the environment remained unclear at the time of the gasoline regulation.<sup>137</sup> Given the uncertainty of the environmental impact, the EPA did not want to require major production modifications of any refiner.

Political feasibility is another possible motivation of the EPA for choosing the mixed individual and statutory baseline

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132. *Id.*

133. See generally Nichols, *supra* note 9, at 15-16.

134. See Submission of the United States, *supra* note 3, ¶¶ 84, 87. One goal of the individual baseline method was to avoid requiring refiners from making gasoline modifications. *Id.* ¶ 84.

135. See generally Submission of the United States, *supra* note 3, ¶ 86.

136. See Submission of Venezuela, *supra* note 17, at 9-10. The same situation that would result for domestic refiners under a statutory baseline resulted for importers under the gasoline regulation. See *supra* notes 85-86 (outlining Venezuela's options under the gasoline regulation).

137. See, e.g., *supra* notes 18-19 (explaining that the reason some ingredients were not included in the simple model was a lack of data).

system. In other words, a desire to ensure political acceptability of the gasoline regulation could provide another reason, beyond notions of fairness, for the attempt to limit the burden on domestic refiners. The EPA needed support from both domestic gasoline refiners and environmentalists. The individual baseline system does not burden any domestic refiner, and at the same time furthers the environmental purpose of the CAA.

Two problems arise from this reasoning. First, the conclusion that either a statutory baseline program or the mixed program would lead to the same result is not correct. Under the mixed system, the average quality of gasoline in any given year would equal the quality in 1990 only if each refiner sold the same amount as they sold in 1990. For example, if refiners of dirtier gasoline sell more now than in 1990, and refiners of cleaner gasoline sell the same amount or less, the overall average quality will decrease.<sup>138</sup> Also, the results of the two alternative programs likely will differ, because it is unreasonable to assume that refiners producing cleaner-than-required gasoline will lower their quality if the statutory baseline applies to them. The statutory baseline would serve as a minimum quality level, not a mandatory level. Thus, while gasoline purity would remain constant under an individual baseline system, it may actually increase under a statutory baseline program.

The second problem with the individual baseline notion is that most foreign refiners cannot meet the requirements. Though the Panel did not find the data persuasive, U.S. studies have shown that calculating baselines through modeling would be infeasible for many foreign refiners.<sup>139</sup> The EPA, therefore, set a statutory baseline for foreign refiners without an individual determination of whether they could meet the requirements to model individual baselines. The United States could have allowed those who were able to meet the requirements to use individual baselines.

Rather than intending to exclude foreign refiners from the gasoline regulation, the EPA first chose the most logical way to carry out the CAA in the United States, and then realized that it was infeasible for importers.<sup>140</sup> It seems as though protection-

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138. See Submission of Venezuela, *supra* note 17, at 17.

139. See *supra* notes 33-36 (detailing the EPA's conclusion that individual baselines were not feasible).

140. Nichols, *supra* note 9, at 47. Assistant Administrator Nichols testified that the first EPA proposal allowed all refiners and importers to set individual baselines. Later, however, they realized the infeasibility of that method for importers, and differentiated based on foreign or domestic refiners. *Id.*



ism did not motivate the EPA, but rather was an effect of the program. If structuring the burden to avoid opposition motivated the gasoline regulation, then the harm to foreign refiners was only incidental.

Notions of fairness, political feasibility, or a combination of both, influenced the EPA to select the mixed method over a non-discriminatory method. The issue, then, is whether these notions could fit within the Article XX definition of "necessary," so that the WTO reasonably would not expect the United States to take another approach.

WTO panels could extend Article XX to include political feasibility as a justification for choosing one measure over another. In addition, perhaps Article XX justifications for GATT violations should be more flexible when an environmental measure is involved. Under current standards, environmental objectives often result in burdensome trade effects and are subjected to GATT scrutiny.<sup>141</sup> A broader reading of Article XX by WTO panels might effectuate a more reasonable result for environmental disputes. This Note does not propose that political feasibility should always be considered as a justification under Article XX. For example, this approach should not be applied in cases of intentional discrimination. Under the circumstances here, however, the gasoline regulation may not have been enacted at all without political compromise. Although this approach is subject to abuse, regulatory schemes depend on political acceptability.

Regardless of how the Panel had decided, it could have taken the opportunity to clarify an interpretation of "necessary." GATT panels, while following the "reasonable alternatives" standard, have not clearly interpreted the meaning of those words, and have not considered them in light of an environmental product characterization dispute.<sup>142</sup> Such environmental issues surely will continue to arise, and defending countries will continue to look for a liberal reading of Article XX, so that environmentally motivated regulations may be upheld. The Panel, however, failed to define "necessary" beyond restating the general notion of reasonable alternatives.

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141. Charnovitz, *supra* note 48, at 467.

142. See generally *supra* notes 77-82 and accompanying text (describing panel decisions under Article XX).

#### IV. CONCLUSION

The Panel's narrow decision was proper under current GATT law. The gasoline regulation clearly violates Article III:4, and is not "necessary" under prior Article XX decisions. Political necessity, however, plays a role in the structure and enforcement of environmental laws. Distributing the burden of product standards depends on more than technical feasibility; it involves fairness and acceptability.

The gasoline dispute raises the question of whether GATT Article XX should be expanded to allow environmentally motivated, but adversely discriminatory, regulations which can be justified by political necessity. The GATT should take a stand on this issue to provide clarity in future situations. Some may argue that allowing political feasibility to provide a defense for trade discrimination will open a Pandora's Box. It will start a flood of disputes arguing exactly how broadly Article XX can be read, and what constitutes political necessity. Adapting to new ideas, however, always involves a degree of risk taking and requires some line drawing. If the WTO chooses to continue interpreting Article XX narrowly and only allow GATT violations for reasons of technical necessity, it should say so clearly. If it is willing to limit the definition of "reasonable alternatives," thereby expanding the scope of Article XX, then the gasoline dispute may have provided it with an opportunity which it failed to take.

